No. 02-1850

Supreme Court, U.S.
FILED
JUL 23 2003
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

WINIFRED N. COTTER; VINCENT J. DIFAZIO; JOHN P. DORIS; WILLIAM J. DWAN; WILLIAM G. KNECHT; PATRICK L. MURPHY; THOMAS L. SEXTON,

*Petitioners,*

*v.*

THE CITY OF BOSTON; DENNIS A. WHITE; HAROLD WHITE; MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF IN OPPOSITION FOR RESPONDENT THE CITY OF BOSTON

WILLIAM V. HOCH
*Office of the Legal Advisor*
Boston Police Department
One Schroeder Plaza
Boston, MA 02120
(617) 343-4550

RORY FITZPATRICK
*Counsel of Record*
IRENE C. FREIDEL
ANDREW C. GLASS
KIRKPATRICK & LOCKHART LLP
75 State Street
Boston, MA 02109
(617) 261-3100

*Attorneys for Respondent*
*The City of Boston*

181977

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court should deny the petition for writ of certiorari (the "Petition") where the First Circuit's decision that the promotions at issue were a narrowly-tailored means of remedying vestiges of past discrimination at the Boston Police Department does not conflict with the decision of any other court of appeals or of this Court.

B. Whether the Court should deny the Petition where the First Circuit's decision that petitioners lack standing to pursue claims for damages was ancillary to the First Circuit's disposition of the case and does not conflict with the decisions of any other court of appeals or of this Court.

C. Whether the Court should deny the Petition where petitioners never adequately presented to the First Circuit the state law questions raised in their Petition and where those questions do not present a federal question – let alone an important federal question – that merits review by this Court.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW ..... | i |
| TABLE OF CONTENTS ..... | ii |
| TABLE OF CITED AUTHORITIES ..... | v |
| STATEMENT OF THE CASE ..... | 1 |
| A. Procedural History ..... | 2 |
| B. Factual History ..... | 4 |
| REASONS FOR DENYING THE PETITION .... | 7 |
| I. THE FIRST CIRCUIT'S DECISION RESTS ON WELL-SETTLED PRINCIPLES OF LAW, WHICH ARE NOT IN DISPUTE ... | 7 |
| A. The First Circuit Appropriately Considered Whether The Department Had A Strong Basis In Evidence To Make The Promotions At Issue, And Determined That It Did ..... | 8 |
| B. The First Circuit Appropriately Analyzed Whether The Promotions At Issue Were Narrowly Tailored To Meet The Department's Compelling Interest, And Found That They Were ..... | 14 |
| C. Petitioners Argue That The First Circuit Misapplied The Law And Made Erroneous Factual Findings; Petitioners Provide No Basis For The Court To Grant Review ..... | 16 |

*Contents*

*Page*

1. Petitioners argue that the First Circuit's decision was wrong because the Department purportedly had no contemporaneous evidence of the continuing effects of past discrimination ..... 17

2. Petitioners argue that the First Circuit's decision was wrong because the Department purportedly made no contemporaneous recording of its reasons for making the promotions at issue ..... 19

3. Petitioners argue that the First Circuit ignored an earlier consent decree governing sergeant promotions ..... 20

4. Petitioners argue that the First Circuit improperly permitted the Department to assert several compelling interests for making the promotions at issue ..... 21

5. Petitioners argue that the First Circuit applied the wrong standard of review ..... 21

*Contents*

*Page*

II. THE FIRST CIRCUIT'S DECISION REGARDING PETITIONERS' STANDING DOES NOT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT OR OF THIS COURT, AND WAS ANCILLARY TO THE FIRST CIRCUIT'S DISPOSITION OF THE CASE ..... 22

III. THE COURT SHOULD DECLINE TO REVIEW THE STATE LAW ISSUES THAT PETITIONERS ASSERT ARE RELEVANT TO THE CASE; NONE PRESENTS AN IMPORTANT FEDERAL QUESTION .... 25

CONCLUSION ..... 28

## TABLE OF CITED AUTHORITIES

*Page*

**Federal Cases**

*Abrams v. Johnson*,
521 U.S. 74 (1997) ..... 8

*Adarand Constructors, Inc. v. Mineta*,
534 U.S. 103 (2001) .....9, 18, 26

*Adarand Constructors, Inc. v. Slater*,
228 F.3d 1147 (10th Cir. 2000) ..... 18

*Aiken v. Hackett*,
281 F.3d 516 (6th Cir. 2002) ..... 22-23

*Allen v. Wright*,
468 U.S. 737 (1984) ..... 22

*Ashton v. City of Memphis*,
__ U.S. __, 123 S. Ct. 87 (2002) ..... 23

*Boston Children's First v. Boston School Committee*,
183 F. Supp. 2d 382 (D. Mass. 2002) ..... 23

*Boston Police Superior Officers Federation v. City of Boston*,
147 F.3d 13 (1st Cir. 1998) .....9, 15, 20

*Brockett v. Spokane Arcades, Inc.*,
472 U.S. 491 (1985) ..... 26

*Builders Association of Greater Chicago v. County of Cook*,
123 F. Supp. 2d 1087 (N.D. Ill. 2000) ..... 18

*Cited Authorities*

*Page*

*Byers v. City of Albuquerque*,
150 F.3d 1271 (10th Cir. 1998) ..... 23

*City of Richmond v. J.A. Croson Co.*,
488 U.S. 469 (1989) ..... 8, 14, 19

*Coral Construction Co. v. King County*,
941 F.2d 910 (9th Cir. 1991) ..... 18

*Cotter v. Massachusetts Association of Minority Law Enforcement Officers*,
219 F.3d 31 (1st Cir. 2000) ..... 2, 10

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993) ..... 9

*Davis v. United States*,
417 U.S. 333 (1974) ..... 11

*Davis v. United States*,
405 U.S. 933 (1972) ..... 11

*Donahue v. City of Boston*,
304 F.3d 110 (1st Cir. 2002) ..... 23

*EEOC v. Federal Labor Relations Authority*,
476 U.S. 19 (1986) ..... 10, 27

*Engineering Contractors Association of Southern Florida, Inc. v. Metropolitan Dade County*,
122 F.3d 895 (11th Cir. 1997) ..... 18

*Cited Authorities*

*Page*

*Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*,
122 F.3d 1211 (9th Cir. 1997) ..... 27

*Fournier v. Reardon*,
160 F.3d 754 (1st Cir. 1998) ..... 26

*Graham v. Connor*,
490 U.S. 386 (1989) ..... 26

*Grahek v. City of St. Paul*,
84 F.3d 296 (8th Cir. 1996) ..... 23

*Grutter v. Bollinger*,
__ U.S. __, 123 S. Ct. 2325 (2003) ..... 14

*Harrison & Burrows Bridge Constructors, Inc. v. Cuomo*,
981 F.2d 50 (2d Cir. 1992) ..... 18

*Huddleston v. Dwyer*,
322 U.S. 232 (1944) ..... 26

*Kosak v. United States*,
465 U.S. 848 (1984) ..... 10, 12, 27

*Kost v. Kozakiewicz*,
1 F.3d 176 (3rd Cir. 1993) ..... 27

*Local 28, Sheet Metal Workers' International Association v. EEOC*,
478 U.S. 421 (1986) ..... 13

*Cited Authorities*

*Page*

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) ..... 22

*Massachusetts Association of Afro-American Police, Inc., v. Superior Officers Department*,
973 F.2d 18 (1st Cir. 1992) ..... 20

*Massachusetts Association of Afro-American Police, Inc. v. Superior Officers Department*,
780 F.2d 5 (1st Cir. 1985) ..... 20

*Massachusetts Association of Afro-American Police, Inc. v. Superior Officers Department*,
C.A. No. 78-529-McN (D. Mass. Sept. 16, 1980)
..... 20

*Mackin v. City of Boston*,
969 F.2d 1273 (1st Cir. 1992) ..... 15

*Majeske v. City of Chicago*,
218 F.3d 816 (7th Cir. 2000) ..... 7

*McNamara v. City of Chicago*,
138 F.3d 1219 (7th Cir. 1998) ..... 14, 15, 23

*Miller v. Johnson*,
515 U.S. 900 (1995) ..... 7

*Northeastern Florida Chapter, Associated General Contractors of America v. Jacksonville*,
508 U.S. 656 (1993) ..... 22, 24

*O'Sullivan v. Boerckel*,
526 U.S. 838 (1999) ..... 28

*Cited Authorities*

*Page*

*Petit v. City of Chicago*,
2001 WL 629306 (N.D. Ill. May 25, 2001) ..... 23

*Quinn v. City of Boston*,
325 F.3d 18 (1st Cir. 2003) ..... 10

*Rice v. Sioux City Mem'l Park Cemetery*,
349 U.S. 70 (1955) ..... 7, 25

*Rogers v. Lodge*,
458 U.S. 613 (1982) ..... 27

*Schurr v. Resorts International Hotel, Inc.*,
196 F.3d 486 (3d Cir. 1999) ..... 18

*Shaw v. Hunt*,
517 U.S. 899 (1996) .....8, 17, 18

*Sims v. Ware*,
1999 WL 637226 (N.D. Tex. Aug. 20, 1999) ... 23

*Skinner v. City of Miami*,
62 F.3d 344 (11th Cir.1995) ..... 26

*Stuart v. Roache*,
951 F.2d 446 (1st Cir. 1991) ..... 20

*Texas v. Lesage*,
528 U.S. 18 (1999) ..... 22, 23, 24

*United States v. Paradise*,
480 U.S. 149 (1987) ..... 11, 14, 15

*Cited Authorities*

*Page*

*Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988) ..... 25

*Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) ..... 11

*West Tennessee Chapter of Associated Builders and Contractors, Inc. v. Board of Education of the Memphis City Schools*, 64 F. Supp. 2d 714 (W.D. Tenn. 1999) ..... 18

*Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262 (11th Cir. 2001) ..... 23, 24

*Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) ..... 7, 8, 11

**State Case**

*Massachusetts Association of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256 (2001) ..... 16

**Federal Constitution, Statutes, Regulations, And Rules**

U.S. Const. art. III, § 2, cl. 1 ..... 22

42 U.S.C. § 1983 ..... 2, 26

42 U.S.C. § 2000e-2 ..... 3

*Cited Authorities*


| | *Page* |
|---|---|
| Fed. R. Civ. P. 24(a)(2) | 2 |
| 29 C.F.R. § 1607.4(D) | 5, 12 |
| Supreme Court Rule 10 | 7, 17 |
| Supreme Court Rule 14.1(a) | 28 |
| **State Statutes** | |
| Mass. Gen. Laws ch. 31 | 25, 26 |
| Mass. Gen. Laws ch. 31, § 27 | 15 |

## STATEMENT OF THE CASE

There is no reason for the Court to grant certiorari in this case. The First Circuit Court of Appeals decided that the Boston Police Department promoted three African-American patrol officers to sergeant to remedy well-documented and persistent effects of its past discrimination and that the Department's remedy was narrowly tailored. Both the District Court and the First Circuit subjected the Department's actions to the strictest scrutiny, and both courts decided correctly that those actions fit squarely within the well-established parameters set forth in the opinions of this Court. The decision below is not in conflict with the decisions of any other circuit or any decisions of this Court. The case below did not present any novel or unsettled questions, and no aspect of the First Circuit's opinion on the merits requires further review.

The Court should reject petitioners' request that it review ancillary issues of standing. The First Circuit's decision that petitioners lacked standing to seek damages is fully in accord with the prior decisions of this Court. Moreover, the First Circuit found that the petitioners did have standing to press their claim for injunctive relief but rejected the claim on the merits. Petitioners were not harmed by the First Circuit's standing decision.

Finally, petitioners provide no basis for the Court to grant a writ in this case to review questions of state law. None of those issues presents a federal question – let alone an important federal question – that merits review by this Court. Moreover, petitioners never brought state law claims in the District Court and never adequately presented any state law questions to the First Circuit for review. Accordingly, no issues derived from state law are properly before the Court.

## A. Procedural History

Petitioners are Caucasian officers of the Boston Police Department (the "Department") who sought, but did not obtain, a promotion to the rank of sergeant in 1997. On May 21, 1999, petitioners filed suit against respondent the City of Boston (the "City") alleging that the Department violated petitioners' civil rights under 42 U.S.C. § 1983 by failing to promote them purportedly on the basis of their race. Petitioners asserted that they were "bypassed" in favor of three African-American officers. Petitioners also sued James J. Hartnett, Jr. ("Hartnett"), in his official capacity as Personnel Administrator of the Commonwealth of Massachusetts Human Resources Division ("HRD").[1]

Respondent the Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO") and two of the African-American sergeants, respondents Dennis A. White and Harold White, whose promotions are at issue here, sought to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). *See Cotter v. MAMLEO*, 219 F.3d 31, 34-37 (1st Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001). Vacating the District Court's denial of their intervention, the First Circuit found that MAMLEO's members had a "substantial" interest in determining "how the Boston Police Department handles, and is allowed to handle, comparable situations [to the instant case] . . . in the future." *Id.* at 37.

On January 14, 2002, the District Court dismissed Hartnett from the action after Hartnett agreed to a settlement of petitioners' claims. *See* App. D to Pet.

---

1. On or about August 17, 1999, Hartnett moved to dismiss petitioners' complaint. The District Court denied Hartnett's motion on October 20, 1999. *See Cotter v. City of Boston*, 73 F. Supp. 2d 62 (D. Mass. 1999) (App. E to Pet., indicating in error that the court's order is dated October 20, 2002).

After full discovery, the City moved for summary judgment, asserting that: (1) the District Court did not have subject matter jurisdiction because appellants lacked standing; and (2) the promotions at issue were a narrowly-tailored means of meeting several compelling government interests, including remedying vestiges of past discrimination in the Department's promotions of minority officers to the rank of sergeant.[2]

On March 22, 2002, the District Court dismissed petitioners' claims and entered judgment in favor of the City and MAMLEO. In its March 21, 2002 Memorandum and Order, the court rejected the City's arguments on standing and operational needs but found that the promotions at issue were a narrowly-tailored means of remedying continuing effects of past discrimination at the Department and avoiding the reasonable likelihood of Title VII[3] litigation. *See Cotter v. City of Boston*, 193 F. Supp. 2d 323, 357 (D. Mass. 2002) (hereinafter, "193 F. Supp. 2d at __") (App. C to Pet.).

Although finding that the promotions at issue did not violate the Constitution, the District Court retained jurisdiction post judgment to oversee all of the Department's future hiring and promotional decisions for sworn (and possibly civilian) employees involving race. *Id.* at 357-58.

On April 8, 2002, petitioners filed an appeal. On April 22, 2002, the City filed a cross-appeal on the issues of petitioners' standing and the District Court's retention of jurisdiction.

---

2. The City also asserted that the promotions were a narrowly-tailored means of meeting the compelling government interests of (1) avoiding the reasonable likelihood of Title VII (42 U.S.C. § 2000e-2) litigation if the Department made strict rank order promotions and (2) meeting the Department's operational needs.

3. 42 U.S.C. § 2000e-2.

On March 25, 2003, the First Circuit entered judgment affirming the District Court's decision that the City's actions did not violate petitioners' constitutional rights and reversing the District Court's retention of jurisdiction over the case. *See* App. B to Pet. In its March 25, 2003 Opinion, the First Circuit ruled that petitioners did not have standing to pursue their claims for damages but had standing to seek injunctive relief granting them immediate promotion. *See Cotter v. City of Boston*, 323 F.3d 160, 166-67 (1st Cir. 2003) (hereinafter, "323 F.3d at __") (App. B to Pet.). The court declined to rule on whether petitioners had standing to seek injunctive relief barring "unlawful discrimination . . . in future promotion contests" involving petitioners. *Id.* at 167-68. Addressing the merits of petitioners' claims, the court ruled that based on the undisputed facts in the record, the promotions at issue were a narrowly-tailored means of remedying vestiges of past discrimination at the Department. *Id.* at 169-72. Finally, the court ruled that "the district court lacked the subject matter jurisdiction to retain jurisdiction over [the Department's] future hiring decisions, and lacked the necessity required to retain jurisdiction over [the Department's] future promotional decisions" and reversed that portion of the District Court's decision. *Id.* at 172-74.

On April 21, 2003, petitioners filed a petition for rehearing en banc. On May 28, 2003, the First Circuit denied the petition as untimely. *See* App. A to Pet. On June 19, 2003, petitioners filed the instant Petition with this Court.

**B. Factual History**

In 1996, the Commonwealth of Massachusetts administered a sergeant promotional examination pursuant to state civil service laws. The Department thereafter requisitioned 30 sergeants for promotion in December 1997. *See* 323 F.3d at 164. As part of the requisition process, the Commonwealth prepared a list of those officers eligible for promotion based on the results of the 1996 examination.

Using "strict rank order," each of the first 25 officers appearing on the eligibility list (with scores from 92 through 86), except for one officer bypassed for cause, was identified for promotion. Civil service regulations and customary practice provide that the Police Commissioner was then to fill the remaining 5 slots by choosing 5 of the 7 officers who were in the next group on the list with tie scores of 85. *See* 193 F. Supp. 2d at 354.

Once the Department identified the 30 officers for promotion, no others on the list would be reached for promotion in connection with the December 1997 requisition. *See* 323 F.3d at 164. None of the petitioners were identified for promotion because they each received a score of 84 on the promotional exam, and thus were not eligible for promotion under the system of strict rank order promotions.

After the Department identified the original 30 officers for promotion, the Department developed concerns that the promotions would have a negative effect on the Department from both a legal and operational perspective: Had the Department made the original 30 promotions in strict rank order, it would have promoted 29 white officers and one African-American officer. *Id.* The Department determined that such a result would violate the so-called "four-fifths rule" in the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D), which indicates adverse impact against minority candidates. *Id.*

For this and other reasons discussed below, the Department decided to promote 27 candidates – 26 white officers and one African-American officer, who had scores ranging from 92 (the highest score) down to 85 – in strict rank order (bypassing one person for cause) and to promote three additional African-American officers, Dennis A. White, Harold White, and John Johnson, who scored 84. *See* 323 F.3d at 164-65.

The decision to promote Officers White, White, and Johnson from among the candidates with scores of 84 was made only *after* the decision that those receiving 84 and lower would not be promoted and after the original list of those to be promoted revealed that adverse impact would result.

In promoting 27 candidates in strict rank order, and then promoting Officers White, White, and Johnson, the Department bypassed 5 officers scoring 85. But for the promotion of Officers White, White, and Johnson, 3 out of those 5 would have received a promotion. No one else, including petitioners, was affected by the decision to promote Officers White, White, and Johnson.

After the Commonwealth objected to the decision to bypass the officers with scores of 85, the Department became concerned that the promotions of Officers White, White, and Johnson might be in jeopardy. *See* 193 F. Supp. 2d at 332. Rather than demote them, the Police Commissioner decided to promote 6 additional officers (one formerly bypassed for cause and all 5 who scored 85).[4] *See* 323 F.3d at 165.

Since the promotions at issue were made, the Department has not relied on the 1996 examination to promote any other individuals to the rank of sergeant. Another promotions examination was administered in 1998, and all promotions to sergeant since those at issue have proceeded in strict rank order, except for bypasses for cause. *See* 193 F. Supp. 2d at 332.

---

4. Petitioners misspeak when they assert that "HRD permitted the promotions [at issue] provided that the City of Boston promote all candidates down to and including the score of 84, but excluding all white candidates at score 84." Pet. at 3. HRD's permission did not turn on the Department's "excluding" the "white candidates" who scored 84. Rather, HRD simply found that the Department's promotion of 36 patrol officers – including all candidates scoring 85 and above plus Officers White, White, and Johnson who scored 84 – to be acceptable. *See* 193 F. Supp. 2d at 332.

## REASONS FOR DENYING THE PETITION

Petitioners ask the Court to review the First Circuit's application of well-settled principles of strict scrutiny to the undisputed record of this case. The Petition, however, is based entirely on petitioners' claim that the First Circuit made erroneous factual findings and misapplied the law. The Petition sets forth no conflict between the decision of the First Circuit and the decision of any other court of appeals or of this Court. Nothing in the First Circuit's decision represents a departure from the standard application of garden-variety federal jurisprudence. Moreover, in light of the settled nature of the law, the issues in this case do not carry significant public importance. Rather, the Petition is driven by petitioners' personal interest in this case. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (dismissing certiorari as improvidently granted). The Petition fails to meet the standards for review set forth in Supreme Court Rule 10 and should be denied.

### I. THE FIRST CIRCUIT'S DECISION RESTS ON WELL-SETTLED PRINCIPLES OF LAW, WHICH ARE NOT IN DISPUTE

It is now incontrovertible that remedying the vestiges of past discrimination is a compelling government interest.[5] Any such remedy, however, is subject to strict scrutiny and must be narrowly tailored to meet its goal. In this case, the First Circuit applied these axiomatic principles to a clear record of facts and expert testimony, none of which were genuinely disputed by

---

5. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("[t]here is a significant interest in eradicating the effects of past discrimination" (internal quotation marks omitted)); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *Majeske v. City of Chicago*, 218 F.3d 816, 819-20 (7th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001) (upholding constitutionality of race-based promotions).

petitioners. The court's decision – that the Department's promotion of three African-American officers was constitutional – is consistent with the jurisprudence of the other courts of appeal and of this Court as well as with the prior decisions of the First Circuit. Accordingly, the Petition should be denied.

### A. The First Circuit Appropriately Considered Whether The Department Had A Strong Basis In Evidence To Make The Promotions At Issue, And Determined That It Did

In establishing the existence of a "compelling interest," the government must demonstrate "a strong basis in evidence for its conclusion that remedial action was necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (hereinafter, "*Croson*") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.)); *accord Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4, 910 (1996). The strong basis in evidence may consist of either "a contemporaneous or antecedent finding of past discrimination by a court or other competent body," *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment), or evidence "approaching a *prima facie* case of a constitutional or statutory violation," *Croson*, 488 U.S. at 500.

In this case, the First Circuit did not stray from these principles. It correctly analyzed and determined that a strong basis in evidence existed for the Department's remedial action with respect to its past discrimination. 323 F.3d at 169-72. The court found that a history of past discrimination existed in the Department's promotions of minority officers. *Id.* at 169 ("[t]he Department's history of discrimination is well-documented by past litigation and records"). Specifically, the First Circuit held:

> In 1972, we affirmed a district court's finding that the BPD [(i.e., the Department)] discriminated

> against black applicants through the use of entry-level testing procedures that favored whites. That discrimination resulted in a gross racial disparity among the BPD's ranks.
>
> Nineteen years later we found that racial discrimination in entry-level hiring had adversely affected blacks' representation at the rank of sergeant. 'Remedial action takes time,' we reasoned, 'and discrimination may linger for many years in an organization that had excluded blacks from its ranks.'

323 F.3d at 169 (internal alterations omitted) (quoting *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 20-23 (1st Cir. 1998) (hereinafter, "*Superior Officers*")).

The First Circuit then considered the City's undisputed evidence that the effects of the Department's past discrimination were still being felt by minorities in the Department at the time the promotions at issue were made, finding that the "Department was faced with facts that its efforts at remedying past discrimination had not been successful." 323 F.3d at 170. The court reviewed the statistical analysis prepared by the City's expert, Professor James Medoff,[6] which demonstrated that at

---

6. Petitioners suggest in passing that the City's expert testimony does not meet the standard "set out by this Court in *Daubert*" – i.e., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. at 28. This argument should be summarily rejected. Despite the opportunity to conduct full discovery, petitioners failed to develop *any* evidence to contradict that which was presented by the City and analyzed by Professor Medoff. *See* 193 F. Supp. 2d at 350. Moreover, because petitioners made only cursory mention of the admissibility of Professor Medoff's analysis in their First Circuit briefing, and give the issue even shorter shrift here, the issue is not properly before this Court. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (Cont'd)

the Department, the promotion rate for officers of color to leadership rank – both historically and in 1997 – was significantly lower than the rate for white officers and that the statistical disparity between these promotion rates reflected the continuing effects of past discrimination at the Department.[7]

---

(Cont'd)
do not decide in the first instance issues not decided below" (internal quotation marks omitted)); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (the Supreme Court ordinarily refrains from addressing issues not raised in the court of appeals); *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (an argument not presented to the court of appeals will not be considered by the Supreme Court).

7. Petitioners wrongly imply that in *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003), the First Circuit decided the same issue differently. *See* Pet. at 5; *see also id.* at ii-iii. The *Quinn* court, however, never addressed the question of whether a disparity between minorities in entry-level and upper-level positions was evidence of discrimination in making promotions and specifically declined to answer the question of whether "unconstitutional hiring practices within the [fire department] have caused a disparate impact on the number of minorities in the higher echelons." 325 F.3d at 34. Rather, the court's decision was cabined to determining – for the purpose of comparing the numbers of minority firefighters in the department with the numbers of minorities in the city as a whole – whether the term "firefighters" as used in the consent decree at issue encompassed all minorities in the department or only those in entry-level positions. *Id.* at 29. Petitioners also misrepresent that the consent decrees governing hiring and promotions within the Boston Police Department are one and the same. *See* Pet. at ii. That simply has never been the case. Moreover, contrary to petitioners' assertion, the Department's actions here were not based upon a "consent decree," nor were the Department's promotions of patrol officers to the rank of sergeant ever governed by the scheme of one-to-one hiring at issue in *Quinn*.

Of course, if petitioners truly believed that the *Cotter* and *Quinn* decisions were in conflict with each other, they could have filed a timely petition for rehearing en banc to challenge the *Cotter* decision in light
(Cont'd)

*Id.* ("[a] public employer has the requisite firm basis for believing that remedial action is necessary if there is a statistical disparity between the racial composition of the workforce and the relevant, qualified employment pool") (citing *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment)); *accord United States v. Paradise*, 480 U.S. 149, 168 (1987) (plurality op.) ("[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities")); *Wessmann v. Gittens*, 160 F.3d 790, 803 (1st Cir. 1998) ("[t]he greater the disparity [between the number of qualified minority applicants with those who gain entrance], the stronger the inference that discrimination is the cause of non-entry").

Specifically, the court found that in "October, 1996 (the latest date before the African-American Officers were promoted for which data is available), African-Americans comprised 25.02% of the BPD's 1,547 officers, but only 16.49% of the BPD's sergeants."[8] 323 F.3d at 170. The court held that "[t]his difference is statistically significant, and not reasonably

---

(Cont'd)

of *Quinn*, but petitioners did not. *See* App. A to Pet. More important, a conflict between the decisions of different panels of the same court of appeals is ordinarily not a sufficient basis for granting certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting that in an earlier proceeding, *Davis*, 405 U.S. 933 (1972), certiorari was denied where the solicitor general had noted the conflict was purely internal to the Ninth Circuit).

8. Petitioners assert that in promoting Officers White, White, and Johnson, the Department was establishing a "quota" of having "16.17%" African-American sergeants. *See* Pet. at 7. This assertion should be rejected out of hand. The First Circuit found that the undisputed evidence shows just the opposite, namely that "there were no quotas or long-term guidelines established [by the Department's decision to make the promotions at issue], and there is nothing in the decision requiring affirmative action in future decisions." 323 F.3d at 172.

attributed to chance. This disparity is not just a simple assurance of good intention from the City, but concrete evidence that discrimination existed at the time the African-American Officers were promoted."[9] *Id.*

In addition, the First Circuit reviewed the City's analysis that there would have been an adverse impact against minorities in the Department – within the meaning of the so-called "four-fifths rule" in the EEOC's Uniform Guidelines on Employee Selection Procedures, *see* 29 C.F.R. § 1607.4(D)[10] – had the promotions at issue not been made. 323 F.3d at 164-65, 170. That analysis showed:

> Had the BPD promoted in strict rank order, the selection rate for African-Americans would have been three percent (one African-American officer

---

9. For the first time here, and entirely without elaboration, petitioners argue that that this disparity is not "concrete evidence that discrimination existed" at the time the promotions at issue were made because the disparity purportedly "results directly" from the implementation of either: (1) the consent decree that governs the Department's hiring of patrol officers, Pet. at ii; or (2) the consent decree that until 1995, governed the Department's promotions of patrol officers to the rank of sergeant, Pet. at 4-5. (Contrary to petitioners' assertion, *see* Pet. at ii, 2, the Department's hiring of patrol officers and promotions of them to sergeant were not governed by the same consent decree.) Because these issues were never litigated, they cannot form a basis for granting certiorari. *See Kosc'* 465 U.S. at 850 n.3.

10. The four-fifths rule, 29 C.F.R. § 1607.4(D), provides that:

> [a] selection rate for any race . . . which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

> selected out of thirty-three who passed the examination) and the selection rate for non-African-Americans would have been fifteen percent (twenty-nine promoted out of 192 who passed the examination), for a selection ratio of twenty percent (three percent divided by fifteen percent). This result is well below the eighty percent guideline established by the EEOC.

*Id.* at 165 & n.3. "While not conclusive evidence of discrimination, this discrepancy in selection rate does serve as a 'benchmark against which . . . to gauge [the City's] efforts to remedy past discrimination.'" *Id.* at 170 (internal alternations in original) (quoting *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 478 (1986) (plurality op.)). "In this case, the selection ratio . . . indicat[es] that the City had not yet remedied past discrimination." 323 F.3d at 170.[11]

Petitioners did not genuinely challenge the factual record proffered by the City. Petitioners offered no expert testimony of their own to rebut the testimony of the City's expert. Applying established law to a record of undisputed facts, the First Circuit decided that the City had a strong basis in evidence to take race-conscious action to remedy the continuing legacy of past

---

11. Petitioners argue that adverse impact could not have been a valid justification for the promotions of Officers White, White, and Johnson because ultimately the Department promoted 36 individuals, and thus in promoting Officers White, White, and Johnson, the Department did not completely eradicate adverse impact pursuant to the EEOC's four-fifths rule. Pet. at 3, 21, 27. This argument is a red-herring, however, because the Department's determination that adverse impact would have been caused by making promotions in strict rank order is evidence of why the Police Commissioner decided to promote Officers White, White, and Johnson. That there was still adverse impact after the promotion of 36 officers is not relevant to the inquiry of whether the Police Commissioner's original motivation was constitutional.

discrimination at the Department. Petitioners have offered no justification for this Court to subject the First Circuit's decision to review.

### B. The First Circuit Appropriately Analyzed Whether The Promotions At Issue Were Narrowly Tailored To Meet The Department's Compelling Interest, And Found That They Were

The First Circuit's decision that the promotions at issue were a narrowly-tailored remedy cannot seriously be questioned. Narrow-tailoring analysis "ensures that the means chosen 'fit' [the government's] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 (plurality op.); *accord Grutter v. Bollinger*, __ U.S. __, 123 S. Ct. 2325, 2341 (2003); *see also Paradise*, 480 U.S. at 171-77 (plurality op.). Applying these principles, the First Circuit determined, on undisputed facts, that the remedial action taken by the City was narrowly tailored, holding:

> The Department would have had to promote twenty African-American officers to create a situation whereby the percentage of African-American officers and African-American sergeants was approximately equal. The necessity for relief was great, but the means chosen by the Department were modest – only three African-American officers were promoted out of rank – indicating narrow tailoring.

*See* 323 F.3d at 171 (citing *McNamara v. City of Chicago*, 138 F.3d 1219, 1224 (7th Cir.) ("[t]he [narrow tailoring] test is . . . whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among [sergeants] that is due to the [Department's] intentional discrimination in the past"), *cert. denied*, 525 U.S. 981 (1998)).

To reach this conclusion, the court applied the factors set forth in *Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992), and *Superior Officers*, 147 F.3d at 23. *See also Paradise*, 480 U.S. at 171 (plurality op.) (listing factors to consider when determining if an affirmative action plan is narrowly tailored). First, the court held that "[o]nly qualified minorities were promoted; they were therefore not 'specially,' or unfairly advantaged by their promotions." 323 F.3d at 171. Officers White, White, and Johnson each received a passing score on the promotional examination, and no candidates with higher scores than Officers White, White, and Johnson were bypassed. Petitioners have never contended that Officers White, White, and Johnson lacked any of the skills or qualifications necessary for their work.

Second, the court found: "All officers were competing for a limited number of spots. Because of this competition, the City's promotion of the African-American Officers did not disturb any legitimate, firmly rooted expectations of the [petitioners]." *Id.* Indeed, "[h]ad the City not considered race in the promotions, only thirty promotions would have been made – twenty-nine Caucasian officers and one African-American officer. As a result of the affirmative action plan, those same twenty-nine Caucasian officers were promoted" and "no additional Caucasian officers would have been hired." *Id.* at 171 & n.9 (citing *McNamara*, 138 F.3d at 1222 (defining narrow tailoring as that which "discriminates against whites as little as possible consistent with effective remediation")).

Third, the court determined that "[n]o valid policies have been disturbed by hiring three qualified African-American sergeants. While Massachusetts law requires an explanation for promotions made outside of strict rank order, there is no prohibition on such out-of-rank decisions." 323 F.3d at 171-72 (citing Mass. Gen. Laws ch. 31, § 27); *see also* 193 F. Supp. 2d at 354-55 (finding state civil service law provides that tie-score

candidates who are not promoted – such as petitioners here – are not "bypassed" and allows appointing authorities to make decisions based on race) (discussing *MAMLEO v. Abban*, 434 Mass. 256, 261 n.12 (2001)).[12]

Finally, the First Circuit held that in making the promotions at issue, "there were no quotas or long-term guidelines established, and there is nothing in the decision requiring affirmative action in future decisions. The decision is therefore limited in scope and duration." 323 F.3d at 172; *see also* 193 F. Supp. 2d at 352 (the "undisputed evidence suggests that the Department did what was necessary, and no more, to correct the adverse impact of the 1996 exam").

As set forth above, the First Circuit's strict scrutiny of the Department's promotion of three minority officers to the rank of sergeant is unimpeachable. Nothing in its analysis justifies review by this Court.

### C. Petitioners Argue That The First Circuit Misapplied The Law And Made Erroneous Factual Findings; Petitioners Provide No Basis For The Court To Grant Review

Petitioners make no argument in support of the Petition that the First Circuit's decision in this case is in conflict with

---

12. Nothing in *Abban* required the First Circuit to find that the use of race in making promotions was barred under state law. The *Abban* court specifically did *not* review the use of race in a situation where, as here, non-minority officers were not promoted because of race-neutral reasons and minority officers with the same score were promoted for reasons that comport with the U.S. Constitution. Moreover, the court held that "[c]ivil service allows for special certifications based on race, color, national origin or sex. [*See*] Personnel Administration Rules, PAR 10. . . . The analysis under 'Par 10' . . . is substantially similar to that of the *strict scrutiny standard* for protected classes under an equal protection claim." *Abban*, 434 Mass. at 261 n.12 (emphasis added).

decisions of other courts of appeal or of this Court, or that review of the First Circuit's decision is necessary to (1) establish uniformity among the courts or (2) address an important public question. *See* Supreme Court Rule 10. Instead, petitioners resort to arguing that the First Circuit made myriad erroneous factual findings and misapplied the law. *Id.* These assertions are baseless, and they provide the Court with no basis to grant review.

### 1. Petitioners argue that the First Circuit's decision was wrong because the Department purportedly had no contemporaneous evidence of the continuing effects of past discrimination

Petitioners suggest that the Department had no contemporaneous evidence of the continuing effects of past discrimination at the time it made the promotions at issue but instead justified the promotions on incidents that occurred after they were made.[13] Pet. at 23-24. Yet the unrebutted evidence shows that before making the promotions at issue, the Department performed an analysis of the adverse impact promotions made in strict rank order would have on minorities, 323 F.3d at 164, and maintained statistics contrasting the numbers of minority patrol officers versus sergeants in its ranks, *id.* at 170. Given these specific facts and the Department's ongoing awareness of the need "to address racial disparity and bias within its ranks," *id.* at 169, petitioners' claim falls flat.

Moreover, misreading *Shaw v. Hunt*, 517 U.S. 899 (1996), petitioners seem to suggest that no evidence developed after the challenged action was taken is admissible. *Shaw*, however,

---

13. Petitioners claim – without any proof – that minority officers' complaints of "racial tensions" and "racial targeting" within the department only occurred after the promotions at issue were made. *See* Pet. at 22-23. But rather, these were ongoing issues at the Department despite its efforts to control them. *See* 323 F.3d at 169-70.

did not hold that evidence, which supports a one-time remedial action, is irrelevant or inadmissible simply because it is not proffered until after the action is taken. Rather *Shaw* limits the use of "post-enactment" justifications only to situations where the government acted without any contemporaneous factual support for its actions. *See id.* at 910 (finding there was "little to suggest that the legislature considered the historical events and social-science data that the [challenged] reports recount"). Furthermore, *Shaw* addresses the sufficiency of expert reports and not the admissibility of "post-enactment" evidence, *id.*, and every court of appeals that has directly addressed the question of whether "post-enactment" evidence is admissible has held in the affirmative. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 & n.11 (10th Cir. 2000), *cert. dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (per curiam); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 498 n.12 (3d Cir. 1999); *Engineering Contractors Ass'n of So. Fla., Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911-12 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Harrison & Burrows Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992); *Coral Constr. Co. v. King County*, 941 F.2d 910, 920-21 (9th Cir. 1991); *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087, 1093 (N.D. Ill. 2000). *But see West Tennessee Chapter of Associated Builders and Contractors, Inc. v. Board of Educ. of the Memphis City Schs.*, 64 F. Supp. 2d 714, 718 (W.D. Tenn. 1999).

Accordingly, because of the strong contemporaneous basis in evidence for the Department's actions, to the extent that the First Circuit relied on "post-enactment" evidence of discrimination at the Department – which petitioners have not established – in ruling in the City's favor, it could properly do so.

### 2. Petitioners argue that the First Circuit's decision was wrong because the Department purportedly made no contemporaneous recording of its reasons for making the promotions at issue

Petitioners imply – without authority – that a governmental entity must make a contemporaneous recording of its reasons for using a race-based classification. *See* Pet. at 24-27. The Department did exactly that. In a letter submitted to the state Human Resources Division ("HRD") at or around the time of making the promotions, the Department wrote that it was departing from strict rank order to "ensure compliance with current EEOC guidelines, and applicable federal and state discrimination laws." *See* 323 F.3d at 165. The Department had an obligation to attempt to avoid adverse impact under the EEOC guidelines and to remedy the effects of its past discriminatory behavior. *See Croson*, 488 U.S. at 518 (Kennedy, J., concurring) (based on its obligation to provide equal protection of the laws to its citizens, the government has the "absolute duty" to "eradicate racial discrimination and its effects" where those "wrongs were caused" by the government itself). The unavoidable implication of the Department's letter to HRD is that in making the promotions at issue, the Department was acting to discharge those obligations.[14]

---

14. Petitioners state that "the City testified that is was unaware of any federal . . . law which actually required the use of race . . . [and] was unaware of any discrimination against minorities, since [1995]." Pet. at 21. These charges are entirely unfounded. Commissioner Evans' unrebutted testimony that in making the promotions at issue, he desired to avoid adverse impact against minority patrol officers and was cognizant of the Department's history of past discrimination against them, *see* 323 F.3d at 168, reflects that the Department knew it had to comply with EEOC guidelines and its obligation to remedy the continuing effects of past discrimination at the Department – both dictated by federal law. Moreover, the Department's analysis of the adverse impact promotions made in strict rank order would have on minority patrol officers was an indicator of continuing discrimination against those individuals.

### 3. Petitioners argue that the First Circuit ignored an earlier consent decree governing sergeant promotions

Without elaboration, petitioners imply that because a consent decree governing the promotions of patrol officers to sergeant – i.e., the consent decree entered in *MAAAP*[15] *v. Superior Officers Department*, C.A. No. 78-529-McN (D. Mass. Sept. 16, 1980) (the "MAAAP Decree") – had lapsed in 1995, the Department could not rely on the justification that it was remedying vestiges of its past discrimination in making the promotions at issue. *See* Pet. at ii, 2. This is simply not correct. Nothing in the language or the history of that consent decree evidences that the decree was intended or designed to eradicate all vestiges of past discrimination at the Department but only to provide a framework within which the Department and minorities could work to reduce the disparity between minority patrol officers and sergeants. *See* MAAAP Decree, slip op. at 6 & App. B thereto at 4 (listing as a goal of the decree the need "to prevent the disparity between the percentage of black supervisors and the percentage of blacks eligible for promotion to supervisor from growing"); *accord Stuart v. Roache*, 951 F.2d 446, 448, 451 (1st Cir. 1991); *Superior Officers*, 147 F.3d at 15; *MAAAP v. Superior Officers Dep't*, 973 F.2d 18, 19 (1st Cir. 1992) (per curiam); *MAAAP v. Superior Officers Dep't*, 780 F.2d 5, 6 (1st Cir. 1985). By its terms, the decree was designed so that it would expire five years from its date of entry (subject to a party moving for, and the district court granting, a continuance of the decree) whether or not any of the objectives set forth in the decree had been achieved. *See* MAAAP Decree, slip op. at 7; *accord Superior Officers*, 147 F.3d at 15-17. That the decree ultimately expired simply means that no party sought an extension. The decree's expiration does not establish – as petitioners imply – that all vestiges of

15. The term "MAAAP" refers to the Massachusetts Association of Afro-American Police, Inc., the predecessor of MAMLEO.

past discrimination in sergeant promotions had been remedied by that point in time or that the parties or district court conceded as much. Nor did the decree's expiration preclude the parties from taking further steps to attempt to eradicate remaining vestiges of past discrimination.

### 4. Petitioners argue that the First Circuit improperly permitted the Department to assert several compelling interests for making the promotions at issue

Petitioners assert that the First Circuit misapplied the law by not analyzing each reason proffered by the Department for its use of race to determine if each was a "compelling interest." *See* Pet. at 27-29. The government, however, is not precluded from asserting alternative "compelling interests." Rather, a "governmental actor may have several reasons for racially-motivated action; if any legitimate reason satisfies strict scrutiny, the action is constitutional." 323 F.3d at 168 n.7.

### 5. Petitioners argue that the First Circuit applied the wrong standard of review

Contrary to petitioners' assertion, *see* Pet. at i, 24-25, the First Circuit did not substitute a "plausibility standard" for strict scrutiny review. In the course of reviewing the City's unrebutted testimony regarding the Department's contemporaneous reasons for making the promotions at issue, the First Circuit stated "[i]t is plausible that the Department did not feel the need to identify the multiple factors influencing its decision" at the time it made the promotions. 323 F.3d at 168. The court was simply acknowledging, however, that as long as a governmental entity has a strong basis in evidence when it uses a race-based classification, there is no requirement that the government announce to the world all the reasons it has for its action. Accordingly, petitioners' assertion should be rejected.

Petitioners' various assertions that the First Circuit erred by affirming the grant of summary judgment to the City – on the ground that the City had no valid reason for making the promotions at issue – provide no justification for issuance of a writ of certiorari.

## II. THE FIRST CIRCUIT'S DECISION REGARDING PETITIONERS' STANDING DOES NOT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT OR OF THIS COURT, AND WAS ANCILLARY TO THE FIRST CIRCUIT'S DISPOSITION OF THE CASE

As with its application of strict scrutiny, the First Circuit's application of the law to the evidentiary record pertinent to petitioners' standing was straightforward and routine. Petitioners have pointed to no conflict among the courts on this issue, because there is none. Rather, the First Circuit applied core principles of standing under the U.S. Constitution to an undisputed factual record and determined that petitioners lacked standing to seek damages.

To establish Article III standing, a plaintiff must show that: (1) he has suffered an "injury-in-fact;" (2) there is a causal connection, not too attenuated, between the asserted injury-in-fact and the challenged actions; and (3) it is likely rather than speculative that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *accord Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 664 (1993) (hereinafter, "*Jacksonville*"); *see also Allen v. Wright*, 468 U.S. 737, 751-52 (1984). In addition, to have standing to seek damages based on discrete governmental actions, a defendant may "defeat liability by demonstrating that it would have made the same decision absent the [race-based] consideration," thus showing that the plaintiff was not injured. *See Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) (per curiam); *accord Aiken v. Hackett*,

281 F.3d 516, 519 (6th Cir.), *cert. denied sub nom. Ashton v. City of Memphis*, __ U.S. __, 123 S. Ct. 87 (2002); *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002); *Wooden v. Board of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1277 (11th Cir. 2001); *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274-75 (10th Cir. 1998); *McNamara*, 138 F.3d at 1221; *Grahek v. City of St. Paul*, 84 F.3d 296, 297-98 (8th Cir. 1996).[16]

The First Circuit looked to these fundamental principles in determining that petitioners lacked standing to pursue their claims for damages. 323 F.3d at 166-67. The court held that petitioners could not establish the touchstone of standing, namely, that they suffered injury as a result of the complained of action. *See id.* at 166 (citing *Lesage*, 528 U.S. at 21). Specifically, the court ruled that "[i]t is uncontested that had the Department not used race-conscious criteria, it would have only promoted candidates with a score of eighty-five or higher. Because appellants only scored eighty-four, they cannot show standing for damages."[17] 323 F.3d at 166; *see also Aiken*, 281 F.3d at 520; *McNamara*, 138 F.3d at 1221; *Grahek*, 84 F.3d at 297-98.

Moreover, contrary to petitioners' assertion, *see* Pet. at 14, the First Circuit's analysis does not contradict the Eleventh Circuit's reasoning in *Wooden*, 247 F.3d at 1283, that a plaintiff has not been injured for standing purposes where he was

---

16. *See also Petit v. City of Chicago*, 2001 WL 629306, at *5 (N.D. Ill. May 25, 2001); *Boston Children's First v. Boston Sch. Comm.*, 183 F. Supp. 2d 382, 393 (D. Mass. 2002); *Sims v. Ware*, 1999 WL 637226, at *3 (N.D. Tex. Aug. 20, 1999).

17. Because petitioners could not show they had suffered an injury-in-fact, the First Circuit had no need to reach the question of whether petitioners had shown the requisite causal connection between the asserted injury-in-fact and the challenged actions or whether it was likely rather than speculative that the injury would be redressed by a favorable decision.

eliminated from consideration for selection by a race-neutral first step. Here, the Department applied such a race-neutral first step in identifying for promotion the thirty sergeants it needed through the process of strict rank ordering, all of whom scored 85 or above.[18] *See* 323 F.3d at 164. Once the Department identified the thirty officers for promotion, no others – including petitioners, all of whom scored 84 – were eligible for promotion under the system of strict rank order promotions. *See id.* It was only *after* the Department identified the original thirty officers for promotion that the Department developed concerns that the promotions – which included only one minority officer – would have a negative impact on minorities and undertook to use a race-based classification to correct that impact. *See id.* Petitioners have failed to offer any basis for the Court to grant a writ based on the First Circuit's interpretation of governing standing law.

Petitioners also incorrectly assert that the First Circuit should have applied *Jacksonville*, 508 U.S. 656, and not *Lesage* in determining whether petitioners had standing to pursue claims for damages. *See* Pet. at 14-15. As the Eleventh Circuit held in *Wooden*, however *Lesage* is plainly relevant to the standing inquiry for damages because it defines the relevant injury that a plaintiff must establish to seek damages. 247 F.3d at 1277. By contrast, *Jacksonville*'s "equal footing" analysis applies to prospective injunctive relief "when the government erects a barrier" as part of a "set-aside program." *Id.* at 1276 (citing *Jacksonville*, 508 U.S. at 666). Here, the promotions at issue constituted a single event designed to address the Department's concerns regarding the results of the 1996 examination and were not part of an on-going government set-aside program.

---

18. Petitioners' accusation that the class size of thirty sergeants was "illegal" is without foundation. *See* Pet. 11. Petitioners have never rebutted the Department's evidence that (1) it needed only thirty sergeants and (2) identified thirty candidates – which never included petitioners – through the process of strict rank ordering before ever considering whether to use race in making the promotions.

Moreover, the court's standing analysis was ancillary to the ultimate disposition of the case: Because the court found that petitioners had standing to seek immediate promotion, it thus gave petitioners' claims a full and fair review on their merits. On this basis alone, the Court should decline review of the case.[19] *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (the Supreme Court avoids questions that do not present an issue "of immediate public significance" but are "of importance merely to the litigants") (dismissing certiorari as improvidently granted).

## III. THE COURT SHOULD DECLINE TO REVIEW THE STATE LAW ISSUES THAT PETITIONERS ASSERT ARE RELEVANT TO THE CASE; NONE PRESENTS AN IMPORTANT FEDERAL QUESTION

Petitioners posit that the Court should take review of this case to decide whether Mass. Gen. Laws ch. 31 – the state civil service statute – bars the Department from considering race in making promotions. For a number of reasons, however, petitioners are not entitled to air the issue before this Court.

A dispute over whether a court of appeals correctly applied state law ordinarily does not merit certiorari review, but rather this Court typically defers to the lower court's application of state law. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988) (the Supreme Court "rarely reviews a

---

19. In addressing the issue of standing, petitioners misspeak when they assert that the District Court "found that the Petitioners' *rights had been violated*, and were likely to be violated again because of the use of race in the promotion process." Pet. at 3 (emphasis added); *see id.* at 10. Rather, the District Court found only that petitioners had met the injury-in-fact, and other requirements, necessary to establish standing. 193 F. Supp. 2d at 334. The court, of course, entered judgment in favor of the City as to all of petitioners' claims, thus deciding that petitioners' rights had *not* been violated. *Id.* at 357.

construction of state law agreed upon by the two lower federal courts"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). This is especially so when the state law at issue has no bearing on an important federal question. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The Court's deference reflects its belief that the district and appellate courts are more familiar with, and thus can interpret more efficiently, the laws of the state in which they sit. *See Brockett*, 472 U.S. at 499-500. Petitioners' assertion that the First Circuit failed to apply state law – specifically Mass. Gen. Laws ch. 31 – in deciding whether the City's actions were justified under the U.S. Constitution is the very type of dispute in which this Court typically avoids becoming enmeshed. The issue simply does not present a federal question – let alone an important federal question – and thus does not merit review by this Court.

Furthermore, because petitioners never brought any state-law claims against the City[20] and never adequately presented any state-law questions to the First Circuit (spending little more than a page addressing the issue out of a total of 91 pages of briefing that petitioners presented to the First Circuit), none of those issues are properly before this Court. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) ("[w]e ordinarily do not decide in the first instance

---

20. Petitioners cannot bootstrap their claim that the City violated state law to their Section 1983 claim. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating *federal rights* elsewhere conferred.'" *Fournier v. Reardon*, 160 F.3d 754, 756 (1st Cir. 1998) (emphasis added) (quoting *Graham v. Connor*, 490 U.S. 386, 393-94 (1989)). Section 1983 does not provide a cause of action for alleged violations of state law where no right secured by federal law has been violated. *See Fournier*, 160 F.3d at 757-58 (citing *Skinner v. City of Miami*, 62 F.3d 344, 347 (11th Cir.1995)); *see, e.g., Fournier*, 160 F.3d at 756-58 ("whether Massachusetts law was violated or the department failed to follow its own disciplinary procedures matters little" for Section 1983 purposes, where plaintiff failed to establish that any of his federal rights were violated).

issues not decided below" (internal quotation marks omitted)); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (the Supreme Court ordinarily refrains from addressing issues not raised in the court of appeals); *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (an argument not presented to the court of appeals will not be considered by the Supreme Court); *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) ("a bare assertion does not preserve a claim, particularly when . . . a host of other issues are presented for review"); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir. 1993) ("casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal"); *see, e.g., Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) (declining to address federal statutory issue not properly raised in court of appeals).

## CONCLUSION

That the Petition presents eight unfocused questions for review is proof by itself that petitioners cannot identify a single issue worthy of review on certiorari. *See* Supreme Court Rule 14.1(a); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 858 (1999) (Stevens, J., dissenting) ("[t]he most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts"). Because the remainder of the Petition does no better job in identifying any extraordinary circumstances that would merit certiorari review in this Court, the Petition should be denied.

Respectfully submitted,

WILLIAM V. HOCH
*Office of the Legal Advisor*
Boston Police Department
One Schroeder Plaza
Boston, MA 02120
(617) 343-4550

RORY FITZPATRICK
*Counsel of Record*
IRENE C. FREIDEL
ANDREW C. GLASS
KIRKPATRICK & LOCKHART LLP
75 State Street
Boston, MA 02109
(617) 261-3100

*Attorneys for Respondent*
*The City of Boston*